LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010

ON THE FOLLOWING MEASURE:
H.B. NO. 1882, RELATING TO SHORELINE SETBACK.

BEFORE THE:
HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

DATE: Friday, February 5, 2010 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Mark J. Bennett, Attorney General, or
William J. Wynhoff, Deputy Attorney General

Chair Ito and Members of the Committee:

The Department of the Attorney General provides the following comments.

The bill requires that in any county with a population greater than 500,000, the shoreline setback shall be at least 20 feet from any accreted land along the shoreline. The term "accreted lands" is to have the same meaning as in section 171-1, Hawaii Revised Statutes, where that term is defined as "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."

There are two major issues that arise because the term "accreted lands" is not limited as to time. As written, the bill requires the shoreline setback line to take into account land that accreted at any time, even if the accretion took place decades ago. Because such decades-old accreted land could extend back from the shoreline hundreds of feet, the new setback line could effectively bar construction on the ENTIRE parcel of beachfront land, rendering existing homes that were fully in compliance with prior law in violation of the new law.

The second issue is the bill's potential for raising Takings Clause concerns. In Maunalua Bay Beach Ohana 28 vs.

State of Hawai'i, Civil No. 05-1-0904-05, the ICA held that a State's decision to deprive littoral landowners of EXISTING accreted land raised a potential Taking requiring just compensation. The ICA also held, however, that a State could deny littoral landowners an interest in FUTURE accreted land without triggering a Taking requiring just compensation because an interest in future accreted land is not a vested right. The ICA decision, at this time, is still subject to a potential request for review by the Hawaii Supreme Court.

Because this bill does not restrict its new shoreline setback requirement to future accretions -- i.e., accretions forming after the effective date of this bill -- this Committee must consider the potential for a Takings Clause issue if a court were to view the new shoreline setback requirement as stripping away or impairing a littoral landowner's interest in building out to the old setback line. Whether such an impairment would constitute a Taking, however, could depend upon a fact-specific analysis of the nature of the littoral landowner's economic interests and expectations before enactment of the bill, the degree to which the new setback impacted those interests and expectations, the purpose of the new setback requirement, and other factors.

Accordingly, use of the broad term "accreted lands" in this proposed legislation without further limitation or definition raises serious issues that must be addressed.